IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. FATA, JR., Individually and as Special Administrator for the Estate of FRANK J. FATA, Deceased,	**E.D. Pa. Case No. 2:08-cv-90058**
	(*Transferred from N.D. Ill. Case No. 1:00-cv-1768*)
Plaintiff,	
v.	**Hon. Eduardo C. Robreno**
A.C. AND S., INC., et al.,	**Mag. David R. Strawbridge**
Defendants.	
	CVLO Group 4

DEFENDANTS ERICSSON INC.'S MOTION TO STRIKE THE DEPOSITION TESTIMONY OF ANTON MELLAS OR, ALTERNATIVELY, TO TAKE DEPOSITION OF ANTON MELLAS

COMES NOW Defendant Ericsson Inc. (hereinafter, "Ericsson") and files this Motion to take the Deposition of Anton Mellas (hereinafter, the "Motion"), respectfully showing the Court as follows:

Ericsson files this Motion regarding the deposition of Anton Mellas in the above-captioned *Fata* case. Mr. Mellas was deposed on July 31, 2012. Counsel for Ericsson was not given proper notice of this deposition and, accordingly, did not attend and did not have the opportunity to cross-examine Mr. Mellas. *See* Appearances pages for Anton Mellas July 31, 2012 deposition, attached here as Exhibit A. Discovery closed on August 3, 2012. *See* Group 4 Scheduling Order, April 11, 2012, attached here as Exhibit B.

Plaintiff did not identify Mr. Mellas as a fact witness in this case until his Supplemental Answers to Interrogatories which were served at 11:39 p.m. on August 3, 2012 – literally on the eve of the close of discovery. Before this August 3 supplementation, Plaintiff made no disclosure of Mr. Mellas as a fact witness, let alone as a witness who would offer testimony

specific to Ericsson. *See* Plaintiff's First Responses to Standard Interrogatories, attached here as Exhibit C. As the Court is aware, discovery closed 21 minutes after Plaintiff listed Mr. Mellas as a fact witness, and Ericsson had no realistic opportunity to depose him. Ericsson did not learn of Mr. Mellas' testimony pertaining to Ericsson until Plaintiff served his expert reports on September 4, 2012, one month after the close of fact discovery. Until these reports were served, Ericsson had no knowledge that Mr. Mellas had been deposed, let alone that Mr. Mellas had testified about Anaconda wire and cable.[1]

Pursuant to the August 4, 2011 Protocol for Plaintiff and Co-Worker Depositions taken in the CVLO cases, and this Court's October 26, 2011 Order, Ericsson, through Hawkins Parnell Thackston & Young LLP, agreed to accept email service of deposition notices at the following email address: mdl@hptylaw.com. This is the only email address at which Ericsson agreed to accept email service. *See* August 4, 2011 Deposition Protocol; October 26, 2011 Order; and November 1, 2011 email from Michael Williford to all Counsel of Record, attached hereto as Exhibits D, E, and F, respectively.

Notice of Mr. Mellas' July 31, 2012 deposition was sent via email from the Cascino Vaughn law offices on July 17, 2012. *See* July 17, 2012 email from Nathan Bloom, attached hereto as Exhibit G. This email notice was *not* addressed to mdl@hptylaw.com. *Id.*[2] Accordingly, Ericsson was not properly served with notice of Mr. Mellas' July 31 deposition by the terms of this Court's deposition protocol. Plaintiff cannot use Mr. Mellas' testimony against Ericsson unless Ericsson received notice of the deposition and had the opportunity to cross-

[1] Ericsson is the successor-in-interest to Anaconda Wire & Cable Company.

[2] Ericsson acknowledges that the July 17 email notice was sent to oharton@hplegal.com, which is an old email address for Ollie Harton, one of the attorneys of record for Ericsson. However, notice was never sent to mdl@hptylaw.com, the email address at which Ericsson agreed to accept email service pursuant to the October 26, 2011 Order. The Court implemented the deposition protocol (including requiring each party to designate an email address) to prevent the precise problem that has arisen with Mr. Mellas' deposition.

examine Mr. Mellas, as the August 4, 2011, deposition protocol clearly provides that "[n]o deposition testimony may be used against any party that did not receive notice of the deposition." Exhibit D at p. 4. Ericsson did not receive notice of Mr. Mellas' deposition, and Mr. Mellas' testimony cannot be used against Ericsson unless Ericsson is given the opportunity to cross-examine Mr. Mellas.

WHEREFORE, PREMISES CONSIDERED, Ericsson respectfully requests that the Court strike Mr. Mellas' July 31, 2012 deposition testimony as to Ericsson, or, alternatively, that the Court order Plaintiff to re-tender Mr. Mellas so that Ericsson may conduct cross-examination. Ericsson also requests all other and further relief, at law or in equity, to which it may show itself to be justly entitled.

This 18th day of September 2012.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing **DEFENDANTS ERICSSON INC.'S MOTION TO STRIKE TESTIMONY OF ANTON MELLAS OR, ALTERNATIVELY, MOTION TO TAKE DEPOSITION OF ANTON MELLAS** with the Clerk of the Court for the United States District Court for the Eastern District of Pennsylvania by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

This 18th day of September, 2012.

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